PERBADANAN KEMAJUAN PERTANIAN NEGERI SELANGOR

v.

SELANGOR ORCHIDS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-16-2000]
27 SEPTEMBER 2000

ARBITRATION: *Award - Setting aside - Allegation of misconduct by arbitrator - Onus of proof - Arbitration Act 1952, s. 24(2)*

Daikin ('2nd respondent') and PKPS ('applicant') agreed to embark on an orchid cultivation project ('the project') and a memorandum of understanding ('MOU') was executed between them providing for PKPS to make available 100 acres of land on a 90-year lease. The project was to be undertaken through a joint venture company which was later incorporated and named Selangor Orchids Sdn Bhd (SOSB) ('1st respondent').

Subsequent to the MOU, an unconditional joint venture agreement ('JVA') and a lease agreement were executed between them.

However, PKPS was only able to secure ten acres of land instead of 100 acres. The parties then referred to the dispute for arbitration. On the issue of liability, the arbitrator held that it was the intention of the parties that the project was for a long term involving 100 acres. PKPS filed an originating motion to set aside the award pursuant to s. 24(2) of the Arbitration Act 1952 by alleging misconduct on the part of the arbitrator.

Held:

[1] It is incumbent on PKPS to satisfy this court that the arbitrator had drawn wrong inferences of fact from the evidence. Even if the arbitrator had drawn wrong inferences of fact, that by itself is not sufficient as a ground to warrant setting aside of the award.

[2] The arbitrator merely restated Mr Toshiki Goto's testimony that at the material time the JVA and the lease agreement were executed, Daikin verily believed that it was in fact dealing with the State Government. The arbitrator did not hold that the State Executive Council was bound to alienate the land to PKPS.

[3] The arbitrator had properly and rightfully come to the decision that it was the intention of the parties that both the JVA and the lease agreement were for a long term involving an area of 100 acres.

[4] Since PKPS did not pray for a declaration that the lease agreement was *void ab initio* in their points of defence, they were estopped at this stage from alleging that the arbitrator had committed misconduct for not considering and/or deliberating on an issue which was not before him.

[5] It is trite law that parties are bound by their pleadings. The issue of rescission or frustration in respect of the JVA was not pleaded or raised before the arbitrator for determination.

[Originating motion dismissed with costs.]

Case(s) referred to:

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Berhad [1998] 1 MLJ 69 ***(refd)***

E Rotheray & Sons Ltd v. Carlo Bedarida & Co [1961] 1 Lloyd's Rep 220 ***(refd)***

Gillespie Bros & Co v. Thompson Bros & Co [1920] 13 Lloyd's Rep 519 ***(refd)***

Mapherson Train & Co Ltd v. J Milhem & Sons [1955] 2 Lloyd's Rep 59 ***(refd)***

Middlemiss and Gould (a firm) v. Hartlepool Corp [1973] 1 All ER 172 ***(refd)***

Ong Ban Chai v. Seah Siang Mong [1998] 3 MLJ 346 ***(refd)***

Raja Lope & Tan Co v. Malayan Flour Mills Bhd [2000] 6 CLJ 194 ***(refd)***

Re Great Western Railway Co and His Majesty's Postmaster General [1903] 19 TLR 636 ***(refd)***

Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 ***(refd)***

Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn Bhd [1993] 1 MLJ 112 ***(refd)***

Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] MLJ 87 ***(refd)***

Williams v. Wallis and Cox [1914] 2 KB 478 ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 24(2)

Rules of the High Court 1980, O. 69 r. 2(1)

Other source(s) referred to:

Russel on the Law of Arbitration, 20th edn, 1982, p 422

For the appellant - RR Sethu (Zainudin Ismail, Sajali Abd Ghany, Ashraf Abd Razak); M/s Sajali & Aziz

For the respondent - Wong Kim Fatt (Gulamoydeen Mohd Haniffa & Satish Vasudevan Nair); M/s Gulam & Wong

Reported by Yow Ting Fong

JUDGMENT

Faiza Tamby Chik J:

This is an application by Perbadanan Kemajuan Pertanian Negeri (hereinafter referred to as PKPS) by a notice of originating motion dated 4 February 2000 prayed to set aside the award on liability handed down by the arbitrator, Tan Sri Harun Mahmud Hashim 29 December 1999 (hereinafter referred to as "the award"). The claimants at the arbitration proceeding were Selangor Orchids Sdn. Bhd. (hereinafter referred to as "SOSB") and Daikin Corporation hereinafter referred to as "Daikin") whereas PKPS was the respondent. At the outset, the parties agreed that the arbitrator shall first decide the issue of liability ie, to determine the intention of the parties in executing the joint venture agreement (JVA) and the lease agreement both dated 14 December 1990. The arbitration proceeding commenced on 6 July 1999, continued part heard on 7, 8, 21 and 29 July 1999 and was concluded on 5 August 1999. A total of eight witnesses testified, three on behalf of the claimants and five appeared or behalf of PKPS. The arbitrator, in the award at p. 5 in accordance with the aforesaid understanding ie, on the issue of liability.

> I accordingly find that it was clearly the intention of the parties that this joint venture project was for a long term involving an area of 100 acres and I so hold.

The arbitrator further held at p. 6 of the award as follows:

> It is true that PKPS had no power to degazette forest reserves and alienation of land to it rests with the State Exco but these are facts known to PKPS before it entered into the agreements and cannot form the ground for non-performance of the agreements.
>
> In any event, the joint project being agricultural in nature and planned to continue over a long period of time involving high capital expenditure and natural environment for its success cannot be founded on speculative land ownership and use.
>
> The failure of PKPS to obtain alienation or the 100 acres and the State Government's change of plans in the development of the area other than maintaining it as an ideal location for the cultivation of orchids has resulted in the total failure of PKPS to perform its part of the agreement.
>
> In the circumstances I find that PKPS is solely to blame for the non-performance of the Joint Venture Agreement and the Lease Agreement entered into between the parties on 14 December 1990 and I so hold.

It is against the above findings that the originating motion was filed by PKPS to set aside the award pursuant to s. 24 of the Abitration Act 1952 (the Act). Section 24(2) of the Act reads:

> Where an Arbitrator or umpire has misconducted himself or the proceedings or an arbitration or award has been improperly procured, the High Court may set the award aside.

It is observed that PKPS have advanced various instances which they alleged constitute "misconduct" on the part of the arbitrator. What is misconduct as envisaged under s. 24(2)? The said phrase is not defined in the Arbitration Act 1952 and therefore reliance shall be placed on decided cases. Raja Azlan Shah J (as his Highness then was) in *Syarikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210 explained the same at p. 211F:

> In the law of arbitration, misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias and partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyze and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.

Whereas in *Russel on the Law of Arbitration*, 20th edn, 1982 at p. 422 it was stated the following in respect to "misconduct":

> It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his finding of fact are supported by evidence. It may however be misconduct if there are gross errors in failing to hear or improperly receiving evidence.

The issue that requires determination is whether the grounds advanced in the originating motion fall within the narrow confines of the definition of misconduct and whether there was such a misconduct of the arbitration as is likely to amount to some substantial miscarriage of justice. In *Williams v. Wallis and Cox* [1914] 2 KB 478 at p. 485 Atkin J said:

> With regard to the main question it appears to me that the deputy county court judge formed a misconception as to the meaning of "misconduct". That expression does not necessarily involve personal turpitude on the part of the arbitrator, and any such suggestion has been expressly disclaimed in this case. The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial

> miscarriage of justice, and one instance that may be given is where the arbitrator refuses to hear evidence upon a material issue. In this case the material issue on the landlord's claim for breach of tenant's repairing covenant was that the condition of the premises in 1906, because the tenant's obligation was to keep them in as good and tenantable condition as they were in 1906. The tenant's contention is that the arbitrator refused to hear any evidence upon that material issue. If in fact he did reject that evidence, that would in my opinion be evidence of misconduct upon which the county court judge would be entitled to set aside the award. Whether the arbitrator did or did not reject the evidence we do not decide; it is a question of fact for the county court judge, and as he did not decide it the case must go back to have it determined.

The motion before the court is not a rehearing. It is incumbent on PKPS to satisfy this court that the arbitrator had drawn wrong inferences of fact from the evidence. Even if the arbitrator had drawn wrong inferences of fact that by itself is not sufficient as a ground to warrant setting aside of the award. In *Re Great Western Railway Co. and His Majesty's Postmaster General* [1903] 19 TLR 636 at p. 637 it is stated:

> Mr. Justice Wright said that the Court refused the application of both parties. When an award was made by the Court dealing with numerous details of a case referred to them *in lieu* of arbitration, the total amount of the judgment must be taken to represent the opinion of the Court as to what was fair and reasonable, but it was not to be assumed that every member had assented to all the details of the process by which the final amount was arrived at. In the present instance the sum total was made up of items which had been more or less directly admitted to be correct by both sides, and it would be contrary to all the established legal principles relating to arbitration if an award based upon the figures and evidence presented were liable to be reopened on the suggestion that some of the evidence had been misapprehended or misunderstood.

Therefore it must be shown that there was such a misconduct of the arbitration as is likely to amount to some substantial miscarriage of justice.

It is noted that from the material of initial discussions and memorandum of understanding (MOU) dated 15 June 1990 and in consequence of various informal discussions held in early 1990 between Daikin and PKPS, the parties finally agreed to embark on a major scale orchid cultivation, (the project) followed with the execution of an MOU between Daikin and PKPS (pp. 1 and 2, exh. "HK1" of Kudo's affidavit). The MOU provided for PKPS to make available 100 acres of land on a 90-years lease and the project was to be undertaken through a joint venture company which was later incorporated on 11 September 1990 and named Selangor Orchids Sdn. Bhd. (SOSB). Daikin was *inter alia* required to undertake the day to day

operation of the project, to attend to the marketing and to maintain the export quality of the orchids produced. It was also established during the proceedings that the construction and preparatory works in the farm intended for the project conmenced in early August 1990 – well before the execution of the joint venture agreement. On 14 December 1990 (ie, some six months after the MOU), the unconditional joint venture agreement (JVA) was executed between Daikin and PKPS together with the lease agreement (lease agreement). The salient terms of the JVA (pp. 24-40 of exh. "HK1", Kudo's affidavit) are:

(a) Each party will use its best efforts to promote the interest of SOSB and to accomplish the purpose of the joint venture and in so doing shall act loyally and in good faith towards each other – clause 7.

(b) Clause 8(i)(a) – PKPS shall procure the Appropriate Authority to alienate the provisional site which was approved by the Executive Committee of Selangor State Government on the 27 August 1990 respectively (hereinafter called the State Alienated Land (SAL)), an area of 100 acres more or less as shown in the plan annexed to the draft agreement for Lease referred to in cl. 8(1)(a)(ii) thereof and upon alienation of the said land PKPS shall lease the said land to SOSB *inter alia* upon the following terms:

Firstly, a lease of thirty (30) years at the following annual rent:

(i)	First 10 years	RM24,000 per year
(ii)	Eleventh to the twentieth year	RM26,400 per year
(iii)	Twenty first to the thirtieth year	RM28,800 per year

(c) PKPS will grant to SOSB two (2) options for renewal of thirty (30) years each.

(d) Termination of the JVA was to be by (a) unanimous consent of the shareholders and (b) dissolution of SOSB under the laws of Malaysia – clause 12.

The lease agreement (p. 41-60 of exh "HK1") has the following terms:

(i) PKPS has been granted the SAL;

(ii) The title to the said SAL was pending issuance to PKPS;

(iii) PKPS was desirous of leasing and SOSB was desirous of accepting a lease of the SAL for a period of thirty (30) years commencing from the 1 September 2020 and the terms of the said lease shall be in the form and substance in the Lease Annexed thereto subject to appropriate amendments mutually agreed to by the parties in the event of change in circumstances;

(iv) The Lease Annexure incorporating the terms of the Lease Agreement was attached to the Lease Agreement with the intention for the same to be registered pursuant to the National Land Code upon PKPS making available the SAL.

Only 10 acres was made available initially and on 14 June 1993 (p. 718, exhibit "HK-1"), an additional 20 acres was made available by PKPS to SOSB, making a total of 30 acres for the project. The project kicked off on a full scale way before the JVA and the Lease Agreement were executed. At the material time, SOSB's paid-up capital was RM2 million. Since the paid-up was inadequate to meet the expenses, Daikin provided a loan of RM3 million. A total of RM7,094,900 was eventually loaned by Daikin to SOSB for the project.

It was established in evidence of Hj. Mohamad Din on behalf of PKPS (RW2) that the initial ten acres was meant for a rabbit farm (p. 24, exh. "SVN1") and the additional 20 acres was in fact accorded a Permit Penggunaan issued by the Forestry Department (expiring on 31 December 1994), revocable by one month's notice without compensation (p. 710, exh. "HK1" Kudo's affidavit). PKPS also confirmed in evidence that after its expiry on 31 December 1994, the Permit Penggunaan for the additional 20 acres was not renewed. Hence, after 31 December 1994 the 20 acres that was cultivated on by SOSB was in fact state land and reverted to the Forestry Department. Notwithstanding that only ten acres was alienated to PKPS for the project, whilst both Daikin and SOSB were kept in "blissful-expectation" (arbitrator's findings) that the remaining 70 acres shall be made available soon thereafter but instead of the remaining land, SOSB received various shocking notices in 1997 from third parties namely, M/s. Pimpin Manis Sdn. Bhd. and M/s. Worldwide Holdings Bhd. that SOSB's occupation of the additional 20 acres was unlawful. It was established in evidence by CW1 at p. 5 of exh. "SVN1" that on 20 February 1998, Pimpin Manis demolished and cleared part of the additional 20 acres causing extensive damage, interruptions and disruption to the project. In essence, PKPS was only able to secure ten acres of the SAL instead of 100 acres. It was the testimony of (Hj. Mohamad Din) RW2 that:

(a) PKPS have been successful in obtaining 10,000 acres of Forest Reserves – alienated to PKPS – this is the only piece that failed – RBD 36 – but because of my transfer I do not know why the 100 acres was alienated to PKPS (p. 24 exh. "SVN1");

(b) "We were surprised that PKPS could not obtain alienation of 100 acres – it was the first time PKPS failed (p. 25 exh. "SVN1").

With Worldwide Holdings Berhad also making claims on the additional 20 acres (refer to the evidence of CW1 at p. 5 of exh. "SVN1"), the project was no longer viable as envisaged by the parties pursuant to the JVA. PKPS offered to get out of the JVA by offering its 40% shares in SOSB to Daikin. The parties subsequently agreed to refer the disputes and differences for arbitration. It is observed that the JVA imposed on PKPS an obligation to make available the 100 acres for the orchid cultivation. PKPS on the other hand maintained that all it had to do was to procure the alienation and it was immaterial whether they were successful, their obligation ended.

It can be seen that at the time the JVA and the lease agreement were executed, PKPS was not the registered owner of both the initital ten acres or the additional 20 acres. It was only in 1992 that PKPS was alienated the initial ten acres. It is noted that PKPS in their various documents (p. 25 exh. "HK1"), p. 25 exh. "HK3" pp. 6, 7, 16, 19 and 21 of exh. "HK3" have admitted to the relevant authorities that the alienation of the 100 acres was required to fulfill their obligations to Daikin pursuant to the JVA. Reference is made to PKPS's solicitor's letter dated 23 February 1998 (p. 152 of exh. "HK1"). It is also noted that the arbitrator having seen the relevant documents and having seen and heard the various witnesses, came to a finding of fact that it was the intention of the parties that the joint venture was for a long term involving an area of 100 acres. On the allegation that the arbitrator had misconducted himself by determining issues that were outside the pleadings of the parties, namely that the State Executive Council ought to have alienated the land to PKPS to be leased to SOSB – it is observed that nowhere in the award was it stated that the State Executive Council ought to have alienated the land to PKPS. I think this allegation is misconceived. I am of the view that PKPS had failed to substantiate this allegation in both the originating motion and in the affidavits of Siti Khadijah. On the allegation that the arbitrator erred in law and exceeded his jurisdiction by holding that the applicant (PKPS) was part of the State Government; and that the State Executive Council was bound to, or had no reason not to alienate the land to PKPS. The Arbitrator merely restated, Mr. Toshiki Goto CW2's testimony that at the material time the JVA and the Lease Agreement were executed, Daikin verily believed that it was in fact dealing with the State Government. The arbitrator did not hold that the State Executive Council was bound to alienate the land to PKPS. It has not been shown that the arbitrator had formulated the award on the basis that the State Exco was bound to or had no reason not to alienate the land to PKPS. As the terms of reference required the arbitrator to decide on the intention of parties

when executing the JVA and the lease agreement, it must be noted that in the circumstances no other award could properly have been made than that which was in fact made, and that PKPS has not shown the existence of any irregularity in the award. In *E. Rotheray & Sons Ltd. v. Carlo Bedarida & Co.* [1961] 1 Lloyd's Rep. 220 at p. 224, Mr. Justice McNair said:

> The more difficult question however, is whether the extent of that irregularity is such as to justify interference by this Court either by way of setting aside the award or remitting the award. The determination of that issue, as it seems to me, depends upon whether the Court is satisfied that there may have been – not must have been – or that this irregularity may have caused – not must have caused – substantial miscarriage of justice that would be sufficient to justify the setting aside or remitting of the award, unless those resisting the setting aside or remission could show that no other award could properly have been made than that which was in fact made, notwithstanding the irregularity.

The arbitrator correctly held that the State Government was involved when they approved state land (100 acres) for orchid cultivation to PKPS based on exh. HK1 at pp. 63 to 65 in particular item 9.2(e) at p. 65 of encl. 3 which was tendered by the applicant (PKPS). The arbitrator further correctly held the involvement of the state when he was referred to cl. 8(i)(a) of the JVA wherein PKPS had reconfirmed the State Government's involvement when they approved to them the State land on 29 August 1990 for orchid cultivation. Since PKPS was the party that had led evidence of the involvement of the state but offered no evidence as to the outcome of their application for the said land, the arbitrator was correct when he queried why there was no explanation as to why the state had not used its power to alienate the land to PKPS but instead used its power to alienate the land to third parties. The arbitrator never held the State Government was a party to the JVA and the lease agreement. In fact the arbitrator was vigilant and mindful of the power of the State Government when he stated that the power of alienation rests with the State Exco – and he emphasised this twice in his award, first at p. 3, at para. 7 "The power (alienation) to do so is with the State Exco" and at p. 6, para. 2 "It is true that PKPS had no power to degazzete forest reserves and alienation of land to it rests with the State Exco ... ." The arbitrator clearly acknowledged on p. 2 of the award (para. 10) that PKPS had no power to alienate land for themselves but that "PKPS was to procure the appropriate authority to alienate an area of 100 acres". During the arbitration the arbitrator clearly noted the evidence of Hj. Din of PKPS (RW2) that PKPS had made a formal application to the Land Office on 1 September 1993 (p. 24, encl. 8) – some three years after the project was launched. He clearly noted the evidence of Hj. Din of PKPS (RW2) that PKPS had

appealed against the decision of the State Exco *vide* letter dated 1 November 1990 executed by Hj. Suhut, the then General Manger of PKPS against the Exco decision to give "Permit Penggunaan" only on the 100 acres (exh. 'HK3' at p. 25 of encl. 3). He clearly noted that at the time of the signing of the JVA and the opening ceremony, PKPS was the only party (para. 10 at p. 5 of the award) with knowledge that the 100 acres that was approved by the State Government only had a Permit Penggunaan which was determinable by the Forest Department with one (1) month's notice and without compensation. He clearly noted at p. 4 of the award (2nd para) that PKPS was aware that when the "JVA and the agreement for lease was entered into, the status of the 100 acres of land was still undecided – certainly its unavailability for purposes of alienation and subsequent lease". He noted the testimony of Hj. Din (RW2) that this was the first time PKPS failed in their application for alienation of the 100 acres (line 47, p. 24 of exh. "SAG1" encl. 8). He noted the testimony of Hj. Din (RW2) that PKPS was shocked to hear of this failure (line 11, p. 25 of exh. "SAG1" encl. 8). He noted the testimony of Hj. Din (RW2) that PKPS never received official notification of rejection of their application. He correctly held (based on the evidence of PKPS) that PKPS should not have entered into the JVA and the lease agreement until and unless the 100 acres was degazetted as a forest reserve by the Forest Department. The arbitrator held PKPS "solely" liable for the non-performance of the JVA and the lease agreement and not the State Government. His conclusion that PKPS was solely to be blamed was also based on the admission of Encik Zahary Malek (RW5) line 28 at p. 34 of exh. "SAG1" of encl. 8 when he stated that PKPS 'promised' to get the 100 acres.

On the allegation that the arbitrator erred in law and had exceeded his remit and jurisdiction in failing:

(i) To distinguish between the duty, role and function of the Menteri Besar as a Chairman of PKPS and as a member of the State Executive Council;

(ii) To hold that neither the Menteri Besar nor the State Executive Council can fetter the exercise of its statutory and governmental functions under the Constitution and the National Land Code;

(iii) To hold that PKPS cannot compel the State Executive Council to exercise its statutory discretion in favour of PKPS; and

(iv) To hold that the agreement for lease was *void ab initio* as PKPS, not

being the owner of the land, lacks the capacity to grant any lease of such land.

I am of the opinion that the above grounds were wholly misconceived as the terms of reference did not at any time require the arbitrator to distinguish between the duty, role and function of the Menteri Besar as the Chairman of PKPS and as a member of the State Executive Council. It is to be noted that any reference to the Menteri Besar in the Award is based on the evidence adduced by RW2 (Hj. Mohamad Din) at p. 23 of exh. "SVN1" in that the Menteri Besar was also the chairman of PKPS and that the appeal by PKPS was in effect made to himself, *albeit* in a different capacity. The arbitrator merely restated the evidence adduced by CW1 who exhibited a large picture of Tan Sri Muhammad Taib shaking hands with Mr. Ito, the president of Daikin Corporation after the signing ceremony of JVA (at p. 68 of exh. 'HK1' of encl. 3) and the testimony of Puan Zainon (RW3) who reconfirmed that the opening ceremony was grand as usually the case for such occasion at line 29, p. 28 of exh. 'SAG1' encl. 8 (please see appendix 2). Nowhere in the award did the arbitrator equate the Menteri Besar as the State Government or that the Menteri Besar in his personal capacity had the power to alienate the 100 acres to PKPS thereby binding the State Government. He was correct when he stated that the Menteri Besar was also "concurrently the chairman of PKPS". In arriving at his decision in respect of the intention of the parties in executing the JVA and the lease agreement, the issues raised in para. (ii) and (iii) above did not require the consideration of the arbitrator – in any event, it was never pleaded and was not at all relevant to decide the issues at hand. Based on the terms of the agreements, conduct of the parties and the oral testimonies of the witness, it is my view that the arbitrator had properly and rightfully come to the decision that it was the intention of the parties that both the JVA and the lease agreement were for a long term involving an area of 100 acres in respect of item (iv), it is my view that the arbitrator can only decide within the terms of reference and that since PKPS did not pray for a declaration that the lease agreement was *void ab initio* in their points of defence, they were estopped at this stage from alleging that the arbitrator had committed misconduct for not considering and/or deliberating on an issue which was not before him.

On the allegation that the arbitrator departed from and misunderstood the issues raised in the claimant's points of claim which was alleged misrepresentation and misconduct to enter into contract there were overwhelming and unrebutted evidence during the proceedings to substantiate the claim that both the JVA and the lease agreement were entered into on the basis of PKPS providing 100 acres of land.

Notwithstanding the fact that the arbitrator did not expressly state in his award that there was misrepresentation and inducement to enter into the contract by PKPS the said point may be dealt with by implication. In *Middlemiss and Gould (a firm) v. Hartlepool Corp* [1973] 1 All ER 172 at p. 176 Lord Denning MR said:

> If a point is raised for decision and by implication has been decided, that is final. The parties cannot be allowed thereafter to re-open it. This has been applied to arbitrations. It is stated in Russell on the Law of Arbitration.
>
> > The award will be sustained even though the arbitrator has omitted to notice some claim put forward by a party, if, according to the fair interpretation of the award, it is to be presumed that the claim has been taken into consideration.

Further the following excerpts of the award (at pp. 4, 5 and 6) lends credence to the said inevitable conclusion:

> It is clear therefore when the JVA and the agreement for lease were entered into, the status of the 100 acres of land was still undecided – certainly its unavailability for the purposes of alienation and subsequent lease.
>
> I accordingly find that it was clearly the intention of the parties that this joint venture project was for a long term involving an area of 100 acres and I so hold.
>
> It is true that PKPS had no power to degazzette forest reserves and alienation of land to it rests with the State Exco but these are facts known to PKPS before it entered into the agreements and cannot now form the ground for non-performance of the agreements.
>
> In any event, the joint project being agricultural in nature and planned to continue over a long period of time involving high capital expenditure and natural environment for its success cannot be founded on speculative land ownership and use.

It is also noted that Daikin would not have lent so much money to SOSB unless they were certain that PKPS would deliver the 100 acres. In any event Daikin had no reason to doubt PKPS, since PKPS was a state body with the Menteri Besar as its chairman. On the allegation that the arbitrator erred in law and misunderstood the legal principles governing the interpretation of the joint venture agreement I am of the opinion that PKPS has failed to substantiate the above and the affidavit of Siti Khadijah has also failed to particularise the instances in which the arbitrator is alleged to have erred in law and misunderstood the legal principles governing the interpretation of the JVA as aforesaid. Therefore, it can only be concluded that there is no basis on this allegation and is unsubstantiated.

On the allegation that the arbitrator erred in law and failed to consider that:

(i) The joint venture agreement had to be interpreted in the light of the surrounding circumstances and existing law. It is my view that JVA was not only interpreted by the arbitrator in light of the surrounding circumstances and existing law but the award bears testimony to the fact that the arbitrator had considered the full background of the project, ie, before the MOU to until the destruction of the project by 3rd parties. PKPS had again failed to substantiate their claim, therefore, it can only be concluded that the same is without basis and is a bare allegation.

(ii) The 1st claimant had no cause of action. SOSB's claim is founded on the lease agreement which was executed with PKPS wherein the latter specifically held out to be the owner of the SAL and proceeded to collect rental and rental was paid from 1990 to 1998. Though PKPS is a minority shareholder of SOSB (but the chairman was a representative of PKPS), for all intent and purpose, SOSB is a legally constituted, separate and distinct entity and as a tenant SOSB is perfectly entitled to assert its rights pursuant to the lease agreement which includes the rights to claim for damages for breach of the said agreement. I conclude that PKPS's allegation is devoid of any merits.

(iii) The 2nd claimant (Daikin) was throughout aware that the land had not been alienated and there was no mention in the minutes of the Board of the 1st claimant (SOSB) of any assurance or any losses arising as a result of non-alienation of the land. It is observed that not a shred of evidence was made available during the proceedings in support of PKPS's contention that Daikin was throughout aware that the land had not been alienated. On the contrary, it was established and accepted by the arbitrator that Daikin was kept in "blissful expectation" that the 100 acres would eventually be leased to them. It is further observed that evidence was led by both CW1 (Hajime Kudo) and W2 (Toshiki Goto) that the issue on non-availability of the SAL (100 acres) was always discussed at the end of SOSB's Board of Director's meeting followed by the assurance by the former General Manager of PKPS who was also the chairman of SOSB that the balance of the SAL would eventually be made available. Further, Daikin believed that PKPS was an extension of the State Government and that it was against the Japanese business culture to go against the government as stated by CW1 – "In Japan we don't go against the government".

The prime question before the arbitrator as agreed by the parties during the arbitration proceedings was to determine the effect of the agreements (JVA and the lease agreement both dated 24 December 1990) entered into between them, ie, to decide the issue of liability and this was recorded by the arbitrator at p. 6 of the award ("the understanding"). Firstly the above understanding was reached between the counsel for both parties. Secondly the said understanding had been reconfirmed by PKPS through the admission of Siti Khadijah binti Zakaria in her affidavits affirmed on 4 February and 12 April 2000 as follows:

(i) **Encl. 2A, para. 5 (affidavit affirmed on 4 February 2000)**

> The parties had, before the arbitrator, agreed that the arbitrator ought to determine the issue of liability first and assessment of damages, if any, could be dealt with later.
> (Please see appendix 3).

(ii) **Encl. 4, para. 55 (affidavit affirmed on 12 April 2000)**

> Walaupun pihak-pihak yang terlibat telah bersetuju isu liabiliti diputuskan terlebih dahulu, saya menafikan perenggan 59 afidavit pertama responden. (Please see appendix 4).

PKPS based on their own admission, are estopped from now submitting that the arbitrator had departed from the points of claim. In any event, to determine the issue of liability, the arbitrator had considered:

(i) The JVA and the lease agreement;

(ii) Heard the evidence of the parties;

(iii) Examined the pleadings, ie, both the points of claim and defence.

It is trite law that parties are bound by their pleadings. The issue of rescission or frustration in respect of the JVA was not pleaded or raised before the arbitrator for determination. He was not given the opportunity to decide this issue which should not be raised before this court. Notwithstanding the fact that rescission or frustration was not pleaded, PKPS did not lead any evidence during the arbitration to establish the said defence of rescission or frustration. In fact it was expressly admitted by PKPS at para. 64, encl. 4 that the same was not pleaded.

> Saya mengakui perenggan 68 Afidavit Pertama Responden bahawa plea of "frustration" tidak di angkitkan dalam pliding PKPS...
> (Please see Appendix 5).

Therefore PKPS is estopped at this stage from raising the said plea – *City Investment Sdn. Bhd. v. Koperasi Serbaguna Cuepacs Tanggungan Berhad* [1998] 1 MLJ 69 (PC), *Ong Ban Chai v. Seah Siang Mong* [1998] 3 CLJ 637 (CA) and *Raja Lope & Tan Co. v. Malayan Flour Mills Bhd.* [2000] 6 CLJ 194 (HC). On the issue of damages this subject matter as agreed between parties is to be dealt with at the next stage.

I am of the opinion that even if the arbitrator misunderstood or misconceived the arguments addressed to him (which in all event is denied by the respondent), it does not fall within the definition of misconduct. In the case of *Mapherson Train & Co. Ltd. v. J. Milhem & Sons* [1955] 2 Lloyd's Rep 59 at p. 66, it was stated by McNair J as follows:

> As to the suggestion that an award is to be remitted because an umpire has misstated the arguments addressed to him by the legal representatives of the parties it seems to me that that is a ground which is entirely without any substance or supported by any decision at all. It would indeed be hard on an umpire if his award is liable to be attacked merely because he has misconceived or misstated the arguments addressed to him.

On the allegation that the arbitrator had completely ignored cl. 14 of the JVA which superceded and nullified all representations save for what was in the contract. I am of the view that the above ground is devoid of any merits as it has not been established that the arbitrator had completely ignored the said provision of the JVA. In any event, it is an established principle of law that the surrounding circumstances and the conduct of the parties can be considered and evaluated to determine the exact intention and understanding between the parties pertaining to a subsequent transaction. On the allegation that the arbitrator failed to recognise and uphold the principle that no damages can be awarded for innocent misrepresentation as no fraud was pleaded by SOSB and Daikin and none was found by the arbitrator I am of the view that it is wholly misconceived as damages can be awarded in respect of negligent misrepresentation. In any event, it is crystal clear that PKPS has now acknowledged that they are in fact and in law guilty of misrepresentation, which admission proves that the arbitrator was right in holding that it was the intention of the parties that the joint venture project was for a long term involving an area of 100 acres. Therefore, the arbitrator was entirely correct in his findings that:

> The failure of PKPS to obtain the alienation of the 100 acres, and the State Government's change of plans in the development of the area other than maintaining it as an ideal location for the collection of orchids has resulted in the total failure of PKPS to perform its part of the agreement.

In the circumstances I find that PKPS is solely to blame for the non-performance of the Joint Venture Agreement and the Lease Agreement entered into between the parties on 24 December 1990 and I so hold.

On the allegation that the arbitrator erred in law and failed to consider whether Daikin had elected to continue with the joint venture despite the non-alienation of the said land I am of the view that for PKPS to succeed, they must show that the alienation/non-availability of the SAL was duly communicated to Daikin which evidence they have failed to establish at the proceedings. PKPS chose not to call upon any of the witnesses from the management level of PKPS (at the material time) especially their former General Manager, Tuan Hj. Suhut. It is noted that mere allegation, unsubstantiated and unsupported by any evidence was unfortunately the backbone of PKPS's case. Therefore whether there was an election by Daikin to continue with the joint venture is a non-issue as it was established by CW1 and CW2 that Daikin was never notified of the non-availability of the SAL throughout their eight years relation with PKPS and neither was it ever stated in any of the 14 board of directors meetings chaired by Hj. Suhut, the General Manager of PKPS. The arbitrator had rightfully concluded that Daikin was kept in "blissful expectation" that PKPS would deliver the 100 acres.

It is submitted the arbitrator in relation to the 1st claimant misconducted and erred in law:

(i) In failing to distinguish the alleged rights of action of the 1st claimant which was a creation of the joint venture agreement. It was not in dispute that the lease agreement was executed on 14 December 1990 between SOSB and PKPS, pursuant to which rental was collected by PKPS thus creating a contractual relationship between the parties. As the landlord, PKPS breached the terms of the lease agreement to provide the SAL, SOSB being the tenant and the aggrieved party was entitled to claim and assert its rights against PKPS, the landlord. Therefore the above allegation is wholly misconceived and it is my view that the arbitrator correctly found in accordance with law and decided that PKPS was liable to SOSB for breach of the terms of the lease agreement;

(ii) In failing to hold that the 1st claimant had no independent cause of action against PKPS. My view is that this allegation is wholly misconceived and that this ground must also fail;

(iii) In failing to recognise that in a dispute between the parties to the joint venture agreement, the 1st claimant, as a company, created pursuant to the joint venture agreement cannot assert rights as an independent entity against either the 2nd claimant or PKPS. It is respectfully submitted that SOSB was incorporated on 11.9.1990, whereas the JVA

was executed on 14.12.1990. Be that as it may, it is to be noted that SOSB was not asserting its rights as an independent entity pursuant to the JVA but its claim against PKPS was pursuant to the lease agreement dated 14.12.1990. It is a claim by a tenant against the landlord for breaches committed by the landlord. Therefore it is crystal clear that the above ground was misconceived and devoid of any merit.

(iv) In failing to consider that the agreement for lease ought to be construed with, and controlled by the language of the primary document, namely the JVA. It is noted that PKPS has not particularised the area in which the arbitrator was alleged to have misconducted himself. In any event, it is noted that upon execution of the lease agreement on 14 December 1990, PKPS collected rental (lease) from SOSB for the entire 100 acres even though only 30 acres was finally made available – some 8 years after the lease agreement was executed. This demonstrated that. PKPS by their conduct, have shown that the lease agreement was independent of the JVA and not as alleged by PKPS as aforesaid.

(v) In failing to find and hold that the 1st claimant (SOSB) had no ground to complain as the award does not, as the award ought to have, find any liability of PKPS to the 1st claimant. The above allegation is again without basis. By virtue of the lease agreement executed between SOSB and PKPS and the latter's failure to fulfill the terms of the same (to provide the SAL) constituted a fundamental breach of the agreement, thereby entitling SOSB to a claim of damages. I think no law in this country can protect a landlord who has been collecting rent for approximately 9 years and thereafter informed the Tenant that he was not the landowner and shall not be liable to damages.

Based on the foregoing, I am of the opinion that PKPS has failed to establish that the arbitrator had misconducted himself, thereby rendering the various allegations and grounds advanced, devoid of any merit. It is my opinion that the arbitrator, a retired Supreme Court judge with vast experience and wisdom had properly considered the facts and had the advantage of having (i) seen and heard the witnesses and (ii) perused all documents made available to him arrived at the correct findings as reflected in the award. It is also my opinion that even if the findings of the arbitrator was erroneous (which the respondent in any event denied) it was not a misconduct. In *Gillespie Bros. & Co. v. Thompson Bros. & Co* [1920] 13 Lloyd's Rep 519 at 524 it was held by Atkin LJ as follows:

> Once they come to that conclusion we cannot interfere. It is no ground for coming to a conclusion on an award that the facts are wrongly found. The facts have got to be treated as found: and, on their finding that there was no such representation, the result in favour of the sellers seems to me to follow. Nor is it a ground for setting aside an award that the conclusion is

wrong in fact. Nor is it even a ground for setting aside an award that there is no evidence on which the facts could be found, because that would be mere error in law, and it is not misconduct to come to a wrong conclusion in law and would be no ground for ruling aside the award unless the error in law appeared on the face of it.

By way of analogy the principles on which the appellate court may interfere with a lower court's finding of fact, the Federal Court in *Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn. Bhd.* [1993] 1 MLJ 112 at p. 117 approved the passage in the judgment of Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* [1964] MLJ 87 Gunn Chit Tuan CJ (Malaya) said:

As regards the principles on which an appellate court may interfere with a lower court's findings of fact we would refer to the following passage in the judgment of Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* in which his Lordship stated as follows:

There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on question of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] 2 All ER 582 at p. 587:

I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or becuse it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

I am of the view that though the above decision refers to the finding of facts by a judge, the principle equally applies to the finding of fact by an arbitrator as in the instant case.

Therefore based on the printed evidence and by virtue of the advantage enjoyed by the arbitrator by reason of having (i) seen and heard the witnesses (ii) perused all the documents exhibited, it is my conclusion that the findings of fact by the arbitrator is correct and ought not to be interfered with and that the award be affirmed. The applicants have failed to show that the arbitrator had misconducted himself. The originating motion dated 4 February 2000 in Lampiran (1) is hereby dismissed with costs for the following amongst other reasons:

(1) The applicants failed to substantiate their allegation that the arbitrator had misconducted himself;

(2) This application is not for rehearing;

(3) The arbitrator having seen the relevant documents and having heard the various witnesses, came to the right finding of fact;

(4) The applicants have failed to discharged the heavy onus required to displace the conclusion formed by the arbitrator on questions of fact.